IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 4056 OF 2006

Munugala Dayakar Aliappa ..Applicant
V/s
The State of Maharashtra and Anr. ..Respondents.

Mr.M.V. Kini i/b Suresh Dubay, Advocate for the applicant.

Mr. P.B. Naiknaware, Advocate for respondent No.2.

Ms. S.V. Gajare, APP for the State.

CORAM : J.H. BHATIA, J.

DATE : 20TH MARCH, 2007.

P.C.

. Heard Mr M.V. Kini learned Counsel for the applicant and Mr. Naiknaware, the learned Counsel for the respondent No.2. This application is filed under Section 482 of Cr.P.C. by the original accused.

2. The case, in brief, is that the respondent no.2 filed a complaint under section 138 of Negotiable Instruments Act against the present applicant and it was registered as Criminal Case No. 121/S/2003 before the Metropolitan Magistrate, 27th Court, Mulund. After the complainant closed his evidence, the statement of

accused under section 313 of Cr.P.C. came to be recorded on 14/10/2003. In response to question No. 12 the accused stated that he wanted to lead defence evidence and in response to question 13 the accused told the Court that he wanted to examine himself on oath in defence. The record reveals that thereafter the matter was adjourned at least on four occasions for recording defence evidence but the defence evidence was not recorded and finally on 6/1/2006 the learned Metropolitan Magistrate passed the judgment and order convicting the accused for the offence under section 138 of Negotiable Instrument Act. The accused preferred the Criminal Appeal No. 97/2007 against the conviction and sentence. In August 2006, the applicant filed an application before the Sessions Court seeking permission to lead additional evidence of himself and one Mr.Jaising in defence under section 391 Cr.P.C. The application was opposed by the complainant and after hearing the parties the learned Additional Sessions Judge, who heard that application, rejected the same by impugned order dated 4/10/2006.

3. According to the applicant before the trial Court, one Mr.U.B. Singh, Advocate was conducting the

case on his behalf and as he had stated in his statement under section 313 Cr.P.C. that he wanted to examine the defence witness and also he wanted to examine himself on oath and for this purpose adjournments were taken. However, in spite of this fact, Mr.U.B.Singh, Advocate never intimated to the accused as to when he was to enter into witness box and to lead defence evidence but he got the matter postponed from time to time. In spite of repeated request made by him, the said Advocate did not examine him, nor he told him when the defence witness was to be examined and finally without his defence evidence, the trial Court was required to decide the matter. The learned Additional Sessions Judge observed that if this mess was created by U.B. Singh, Advocate, action should have been taken against him but no steps were taken by the accused against that advocate. The learned Counsel for the respondent No.2/complainant contended that if he had really any grievance against Mr. U.B. Singh, Advocate he would not prefer the appeal through him and further he contends that in the appeal memo this ground was not taken and this ground was taken for the first time in the application under section 391 Cr.P.C.

4. After giving due consideration to the contention of both the parties and perusal of the record, I find that the appeal was filed by Mr. U.B. Singh, Advocate and if in fact he was at fault in not leading the defence evidence, he was not expected to point out his own fault in the appeal memo. Merely because no steps were taken to take action against him by the accused, it cannot be said that his grievance is not genuine. It is not that before the trial Court he had not expressed his desire to lead defence evidence or to examine himself. In fact, on the very first occasion available to him, that is in his statement under section 313 Cr.P.C. itself, he stated that he wanted to lead defence evidence and also examine himself on oath. The application under section 391 Cr.P.C. came to be filed after he changed the Advocate. In my opinion, in the interest of justice it is necessary that accused/applicant should be given an opportunity to lead the defence evidence. He wants to examine only one defence witness namely Jaising and to examine himself on oath. In my opinion justice demands that this opportunity should be given to him.

5. The application is allowed. Impugned order is

hereby set aside. The learned Additional Sessions Judge shall direct the trial Court to record the evidence of defence witness Jaising, as well as the evidence of applicant/accused on oath and transmit the said record to the appellate Court for consideration at the time of hearing the appeal. The Sessions Court shall issue necessary directions under section 391 Cr.P.C. to the trial court within three weeks from this date and the Sessions Court shall also direct the parties to appear before the trial Court on the date to be fixed by him and after appearance the Metropolitan Magistrate shall fix the date for recording defence evidence. The accused/applicant shall not seek any adjournment for that purpose. The trial Court shall submit the record after recording the defence evidence to the Sessions Court within two months after receipt of the direction from the Sessions Court. The application stands disposed of.

(J.H. BHATIA, J.)